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No. 99-1994

IN THE
Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

(1) Does the sovereign immunity of the State of Nevada, or the state-law immunity of its officers, bar tribal court jurisdiction in actions alleging tribal-law claims and claims based on 42 U.S.C. § 1983 against individually-named state officials, for official actions taken in Indian country with express permission of a tribal judge?

(2) Is a decision on the question of tribal court jurisdiction over state officials properly bifurcated, with consideration of the tribal court's jurisdiction separated from, and antecedent to, a decision on the officials' claims of sovereign and qualified immunity?

(3) Does the rule of *Montana v. United States*, 450 U.S. 544 (1981), creating a presumption against tribal court jurisdiction over non-members, apply to these lawsuits, and if so does it permit them?

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Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. Colo. L. Rev. 123 (2000) 15

Nancy Thorington, *Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 McGeorge L. Rev. 973 (2000) 26

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The decision of the Fallon Tribal Court is reported at 20 Ind. Law Rept. 6038 (May 5, 1993). The Nevada Intertribal Appellate Court decision is reported at 21 Ind. Law Rept. 6076 (May 13, 1994).

The opinion of the district court is reported at 944 F. Supp. 1455 (D. Nev. 1996). The opinion of the Ninth Circuit is reported at 196 F.3d 1020 (1999).

JURISDICTION

The Court of Appeals entered its judgment on March 9, 2000. Petitioners filed their petition for a writ of certiorari on June 6, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

STATEMENT

Just one noteworthy circumstance attended the routine work performed in August 1990 by Nevada Game Warden Michael Spencer: his search for evidence of poaching in

violation of state law occurred on an Indian reservation. That fact, however, triggered a ten-year legal odyssey when the subject of his search, a tribal member, sued him in tribal court. It also triggered a remarkable federal court decision authorizing tribal lawsuits against state employees.

The decision of the Ninth Circuit holds, for the first time, that tribal courts may decide civil actions filed against state officials under tribal law and 42 U.S.C. § 1983. To reach this result, the court embraced several novel principles: (1) tribal courts possess virtually plenary authority, on a level with state and federal courts, (2) state sovereignty does not bar tribal jurisdiction and is only an affirmative defense, (3) tribal courts have jurisdiction to enter civil rights judgments, including punitive damages, against state officials, (4) tribal courts have jurisdiction over nonmember defendants (including State officials) whenever acts complained of occur on tribal land, (5) state officials' individual defenses are not jurisdictional in tribal court, and (6) state officials claiming immunity in tribal court must wait until the question of tribal jurisdiction is decided first, before either the tribal court or federal court may address their claims of immunity.

The Ninth Circuit's decision would have been remarkable enough if the defendants in tribal court had been private individuals. But they were state officials carrying out traditional state functions. Yet the court analyzed this matter as if no constitutional questions arise when state officials assert sovereign and individual immunity from a tribal court's jurisdiction, so long as the tribal claimants plead the cases as individual-capacity rather than official-capacity actions. This analysis initially overlooked, then misapprehended, constitutional first principles about the

proper relationship among States, Indian Tribes and the Federal Government.[1]

Factual background.

The pedestrian origin of this case was a decision by Nevada game wardens in 1990 and 1991 to execute a state search warrant, approved by a tribal judge, on the Fallon Paiute-Shoshone Reservation. Located sixty miles east of Reno, the Reservation lies wholly within Nevada. It was established by federal authority under the Act of April 30, 1908, 35 Stat. 85, and subsequent enactments. Pub. L. No. 95-337 (1978); Pub. L. No. 101-618 (1990). No treaties pertain to its existence.

On two occasions, separated by a year's time, Nevada wardens seized different mounted bighorn sheep heads from the reservation residence of tribal member Floyd Hicks. The wardens believed the property to be evidence of off-reservation poaching that violated state law.

Before seizing the heads, warden Michael Spencer swore out search warrants, *see* P. App. at E-1 to E-2 and F-3 to F-4, in a state court, then as a matter of comity obtained approval from Tribal Judge Rebecca Harold to execute the warrants on the reservation. P. App. at F-1 and G-1. Tribal police officers accompanied the wardens when they conducted the search. *See* Complaints in Case No. CV-091-034, P. App. at H-7; and CV-FT-092-031, J. App. at 11. In each case, the wardens seized a mounted bighorn sheep head, which later proved not to be evidence of crime and which in each instance was eventually returned.

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[1] Record references are made herein as follows: to the Joint Appendix as J. App. at xxx; to the Petitioners' Appendix, contained in the Petition for Certiorari, as P. App. at xxx; otherwise to the Record, by docket number of the district or circuit document, together with page number(s), thus: Dist. R. at XX:xxx, Cir. R. at XX:xxx.

Hicks then sued Spencer in two separate actions and named two other wardens and the administrator of the Nevada Division of Wildlife in one of them. The suits were brought in the same tribal court that had approved the warrants. Hicks thus sued the State of Nevada as well as the officials (hereinafter collectively "the State") and sued the individuals in both their individual and official capacities. Hicks also sued the tribal judge and tribal police officers.[2]

Hicks' original claims sounded in tribal and common law tort and also purported to rely on the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301—1341, which makes most provisions of the Bill of Rights applicable to tribal officials. P. App. at H-1 to H-17, and J. App. at 8-21. He also raised a federal constitutional claim, which the Ninth Circuit presumed was a claim under §1983. 196 F.3d at 1023 n.1. The complaints contained a welter of nonspecific claims: *e.g.* "Spencer . . . did not give [Hicks] a copy of a Search and Seizure Warrant," P. App. at H-3; Spencer did not make out a separate affidavit or written application to the tribal judge, *id.* at H-4; the tribal judge did not approve a search of the Hicks property, *id.* (*compare* tribal court "Order Approving and Authorizing Execution of Search Warrant on Tribal Reservation," P. App. at F-1); a tribal judge may only approve warrants in connection with felonious off-reservation offenses, *id.;* the State did not have a reciprocal agreement with the Tribe, *id.*, H-4 to H-5; violation of due process under ICRA, *id.* at H-6; a hearing should have been held before the search was authorized, *id.*; Spencer did not inform the justice of the peace of Hicks' tribal membership, *id.* at H-14.

Before seeking relief in federal court, Nevada litigated the tribe's jurisdiction for almost three years in tribal court. From the inception, the officials raised the State's and their

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[2] Hicks' case against the tribal officials was dismissed on a directed verdict in 1993. *See* 20 Ind. L. Rept. 6091 (Fallon Tribal Court 1993).

own individual immunities as bars to the tribal court's jurisdiction. Their first brief in tribal court cited the then-new decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (P. App. at J-3 to J-5), for their sovereign immunity argument, and *Anderson v. Creighton*, 483 U.S. 635 (1987), for their individual defense. P. App. at J-5 to J-6. A half year later, the tribal court required briefs on two other decisions: *Nevada v. Hall*, 440 U.S. 410 (1979), pertaining to sovereign immunity, and *Hafer v. Melo*, 502 U.S. 21 (1991), relevant to the question of individual immunity defenses. *See* P. App. at K-1 to K-13.

In 1993, the trial court dismissed the actions for lack of proper service. The State argued, and the tribal judge agreed, that there was no tribal legislative authorization for service of process against defendants located outside the Reservation boundaries. *See* P. App. at L-1 to L-2. In doing so, however, the trial court also expressly held that "it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal jurisdiction over the specially appearing State Defendants in this action." P. App. at L-1. A three-judge appellate panel affirmed the trial judge's decision to dismiss Hicks' actions because of a defect in service. Dist. R. at 25:517-19. In August 1993 Hicks attempted to serve the complaint again. Once again, however, the tribal court dismissed the action for improper service.

Another three-judge appellate panel reversed the dismissal, however. In doing so, it remanded the case "to the Fallon Tribal Court to immediately set a trial date and allow the Plaintiff's civil jury trials to be heard without further delay consistent with this decision." P. App. at C-5. At the same time, it leveled the warning that "State Defendants would do well to recognize that they have not only been sued in their official capacity, but in their individual capacity as well." *Id.*

The State then filed an action in the Federal District Court for the District of Nevada, seeking declaratory and injunctive relief against the Tribal Court, Tribal Judge Joseph Van Walraven, and Floyd Hicks. The State argued, as it had in tribal court, that the status of state officials precluded tribal court jurisdiction over them. The district court denied relief, determining that "the status of the state defendants as state actors [does not] argue persuasively against jurisdiction," P. App. at B-15, and that the prior dismissal of the official-capacity defendants mooted the argument, P. App. at B-4 n.3.

The State appealed to the Ninth Circuit on October 29, 1996. On October 7, 1997, the case was argued and submitted. Three days later, the case was withdrawn from submission for two years. The case languished until it was resubmitted on November 4, 1999, and eventually decided on November 9, 1999.

In affirming the lower court, the Ninth Circuit concluded that "the tribal court has subject matter jurisdiction over the claims brought by Hicks against the state officials." P. App. at A-12. The Circuit also ruled that the immunity questions were not exhausted in tribal court and therefore were not properly before the district court or the appeals court. P. App. at A-3.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in compelling four Nevada officials to defend tribal-law and § 1983 claims in tribal court. Neither the Constitution nor the inherent authority of Indian Tribes empowers tribal courts to act contrary to Nevada's carefully-delimited waivers of immunity for official conduct of state employees. Instead, any relief Hicks claims he was entitled to had to be pursued in state or federal court.

1.a. Indian Tribes lack authority either to abrogate a State's immunity from suit or to alter its officials' state-law

immunity from suit. In contrast to the constitutionally-based sovereignty of the States, Indian Tribes are domestic dependent nations, whose courts (which did not come into existence until the twentieth century) have traditionally existed only to enforce tribal law governing the internal and social relations of tribal members. Neither the text of the Constitution, the plan of the convention, history nor common sense indicates that Tribes may adjudicate causes of action against state officials. Any exercise of judicial power over state officials is inconsistent with the dependent status of Tribes, and accordingly any such power—if it ever existed—was divested by the plan of the convention. Just as *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), rejected the contention that the Tribes' "inherent authority" permitted them to bring claims against States in federal court, it is appropriate to reject here the more anomalous contention that Indian Tribes have inherent authority to decide causes of action against States and state officials in tribal court under tribal law.

Nor may respondents circumvent state immunity by the pleading expedience of naming state officials in their individual rather than official capacity. An individual-capacity lawsuit, like relief under *Ex Parte Young*, is a creature of federal law and of the federal courts. No justification exists for extending these extraordinary doctrines beyond the extraordinary circumstances that gave rise to them—the compelling need for a national forum to vindicate federal rights. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (refusing to apply *Ex Parte Young* to claims filed against state officials in federal court under state law). Neither doctrine applies, and neither doctrine should be extended, to claims filed against state officials in tribal courts.

b. Congress did not authorize § 1983 claims against state officials to tribal court, and at any rate lacked the power to do so. Nothing in the terms of § 1983 or the

history leading up to it contains any indication, least of all an unambiguous one, *see Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), that Congress authorized such actions. Indeed, tribal courts did not even exist when Congress enacted the law. It is implausible that Congress meant to create a cause of action in a court that did not even exist. Nor would Congress have such power, even if it meant to exercise it.

2. The Ninth Circuit also erred in concluding that a State's immunity defense is not jurisdictional, and in failing to ensure that it was addressed at the outset. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The prudential considerations that normally require exhaustion in tribal court, *see National Farmers Union Ins. Cos.*, 471 U.S. 845 (1985), do not apply to immunity defenses raised by state officials in tribal courts.

3. *Montana v. United States*, 450 U.S. 544 (1981), does not authorize Hicks' claims. That decision creates a presumption against tribal jurisdiction over nonmembers, a presumption that applies with special force to tribal claims against state officials—if indeed it does not categorically prohibit such claims. *See Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). Nor do either of the *Montana* exceptions apply. In executing these search warrants, the Nevada wardens were hardly "enter[ing] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. And by executing the warrants with approval of a tribal judge, and in the company of tribal officers, the state officials did not engage in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 566.

ARGUMENT

I. THE SOVEREIGN IMMUNITY OF THE STATE OF NEVADA BARS TRIBAL COURT JURISDICTION OVER INDIVIDUALLY NAMED STATE OFFICIALS FOR OFFICIAL ACTIONS TAKEN IN INDIAN COUNTRY.

Under the law of Nevada, as under the law of all sovereigns, the State may not be sued except to the extent and except in the manner that it has waived its immunity from suit. Through its Legislature, Nevada has recognized what the English monarchy did not—that the actions of government officials performing public functions occasionally warrant recompense and that monetary recoveries thus occasionally may be drawn on the public fisc. *Compare* 1 W. Blackstone *Commentaries* (describing the English common law maxim—"the King can do no wrong"); NEV. REV. STAT. 41.031(1) (1999). *See also* NEV. CONST. art 4, § 22 (authorizing legislature to waive immunity). To these ends, Nevada grants carefully delimited waivers of its immunity for claims against the State itself and for claims against State officials performing public functions. NEV. REV. STAT. 41.031(1) (1999). Under this waiver, claims may be brought in Nevada state court for monetary relief up to $50,000 per incident. NEV. REV. STAT. 41.035(1) (1999). When suit is filed against a state employee, Nevada law also requires the State to provide representation through the Attorney General once she "has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed . . . in good faith." NEV. REV. STAT. 41.0339(2) (1999). The Attorney General has made that determination in this case.

By its terms, however, this waiver of immunity does not extend to Hicks' claims under tribal law and §1983 in tribal court. Nevada expressly preserves its sovereign

immunity. NEV. REV. STAT. 41.031(3) (1999). In the face of this constitutionally-protected assertion of immunity, *see Alden v. Maine*, 527 U.S. 706 (1999), Hicks' tribal court claims must be dismissed and he (a Nevada resident) must obey the same immunity limitations that all Nevada residents must observe unless he can show, first, that the relevant lawmaking body (the Tribe in one instance, the federal government in the other) had the power to abrogate this immunity from suit and, second, that it clearly intended to do so. *See Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996). The Tribe and Hicks cannot fulfill either half of this obligation, and accordingly the claims must be dismissed.

A. Nevada's Immunity From Suit Precludes Tribal Claims Against State Officials In Tribal Court.

This cause is of a piece with the "anomalous and unheard-of proceedings or suits" against States that this Court refused to recognize in *Alden v. Maine*, 527 U.S. at 727 (*quoting Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). The Fallon Tribal Court's assertion of jurisdiction over state officials, in any capacity when stemming from government authorized business, is directly at odds with "history and experience, and the established order of things." *Id.*

In bringing these claims under tribal law, the tribal respondents do not point to a federal statute that purports to authorize them. They thus do not rely upon Article I, § 8, U.S. Constitution, and do not claim that the Federal Government has enacted legislation under the Indian Commerce Clause empowering the Tribes to create these causes of action against state officials carrying out state functions. Instead, they claim "inherent" authority to do so.

1. The Terms Of The Constitution And The Framers' Understanding Do Not Support The Tribal Law Claims.

The text of the Constitution, as an initial matter, offers no refuge for this assertion of authority. The Indian

Commerce Clause represents the only significant mention of tribes in the Constitution. Yet it self-evidently does not create this authority, but rather establishes that "Indian relations [are] the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

Nor can this assertion of inherent authority to preempt state rules of sovereign immunity be squared with "the founders' understanding." *Alden*, 527 U.S. at 734. In accord with that understanding, "[t]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional amendments." *Id.* at 713. Indeed, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517 U.S. at 72. Thus, the "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'" *Blatchford v. Native Village of Noatak*, 501 U.S. at 781 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934)).

Grounded in the Tenth and Eleventh Amendments, this immunity applies both in federal and state courts, *see Alden, supra,* and thus extends to actions in tribal courts because the "plan of the convention" nowhere surrendered this immunity. *Blatchford*, 501 U.S. at 782. The Court confirmed this point nearly a decade ago.

In *Blatchford,* in 1991, the Court considered—and rejected—a claim of inherent authority to strip the States' immunity from suit that is akin to the claim raised here. There, an Indian Tribe claimed that the States' "sovereign immunity does not restrict suit by Indian tribes" against

States because the tribes themselves are "sovereigns." 501 U.S. at 780. And there, as here, the Tribe claimed (*id.* at 782) that it was more analogous to a State, which may sue another State, *see South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904), than it was to a foreign sovereign, which may not coerce non-consenting States to defend suits, *Monaco v. Mississippi*, 292 U.S. 313 (1934). In rejecting this argument, the Court reasoned:

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, *Potawatomi Tribe*, *supra*, at 509, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 501 U.S. at 782.

As *Blatchford* recognizes, waivers of state immunity under the "plan of the convention" have been recognized in just two settings—suits by the United States and suits by sister States. Having refused to extend such waivers of immunity to claims by Indian Tribes in federal court in *Blatchford*, the Court should refuse to recognize the more anomalous claim raised here. Nothing immediately preceding the plan of the convention and nothing accomplished during it suggests that the Constitution silently authorized States to be sued in tribal court.

Nor would tribal authority to abrogate state immunity make constitutional sense. In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), the Court held that Congress lacked authority under the Indian Commerce Clause to

subject non-consenting States to suit by Indian Tribes in federal court. In *Alden v. Maine*, the Court held that Congress lacked authority under the Commerce Clause to subject non-consenting States to suit by individuals in state court. And in *Blatchford*, the Court held that the Constitution does not abrogate the States' immunity from suit by Indian Tribes in federal court. To permit the tribal respondents' claim under these circumstances and at this late date would suddenly delegate to Indian Tribes a power that Congress itself does not have and that the Constitution does not permit. It strains credulity to suggest that the States would have ratified a Constitution that permitted tribal claimants to bring claims under tribal law in tribal court that they could not bring under federal law in federal court.

2. History And The Dual-Sovereign Structure Of The Constitution Do Not Support Tribal-Law Claims Against State Officials.

Not only does the text of the Constitution "specifically recognize the States as sovereign entities," *Seminole Tribe*, 517 U.S. at 71 n.15., and not only is state sovereignty a "presupposition of our constitutional structure," *Blatchford*, 501 U.S. at 779, but history and the structure of the Constitution make implausible the notion that States and their officials could be sued in tribal court.

In *Blatchford* the Court found no "compelling evidence" that the Framers thought the States had waived their immunity in federal court with regard to tribes when they created the Constitution. Here the historical evidence is even more compelling. It was at least plausible to ask in *Blatchford* whether tribes might sue States in federal courts, for federal courts at least were contemplated at the time of the Convention. However, the same question regarding the States' waiver of immunity from tribal claims, though in tribal rather than federal courts, is astonishing even in its contemplation. "Tribal courts in the Anglo-American mold

were virtually unknown in 1789," *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987), when the nation was founded. "[M]ost Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' H.R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834)." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978). Only in the twentieth century have tribal courts developed. *See generally Duro v. Reina*, 495 U.S. 676, 690-91 (1990). Plainly there was no original intent to waive the States' immunity in tribal courts.

The founders, to be sure, did not expressly address suits such as these. But their silence is best explained by the simple fact that "no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity" in the manner proposed. *Alden*, 527 U.S. at 741. And just as in *Alden*, it might be productively asked whether the States ever would have approved an express provision setting forth a waiver of state immunity that would allow tribal courts to exercise jurisdiction in the manner contemplated by the lower federal courts. "The supposition that it would is almost an absurdity on its face." 527 U.S. at 724 (*quoting Hans* at 14-15).

There also is no discernible historical record indicating that States were meant to be subservient to, or regulated by, tribes in any respect. The Commerce Clause, to be sure, establishes federal authority over commerce with the Indians. U.S. CONST. art. I, § 8, cl. 3. But it invites no diminution of state sovereignty in favor of tribal courts, or even federal courts. Any argument to the contrary is foreclosed by *Seminole Tribe*, 517 U.S. 44. Tribes at the time of the nation's formation were viewed as threats to the common security, not as participating sovereigns in a national government. *See* The Federalist No. 24 (Alexander Hamilton) (alluding to the "ravages and depredations of the Indians"), and The Federalist No. 25 (Alexander Hamilton) (discussing "Indian hostilities, instigated by Spain or

Britain"). These contemporaneous references to Indian Tribes refute any notion that the founders intended to make state sovereignty yield to tribal adjudicative powers.

The very structure of the Constitution that the Framers innovated also undermines this claim. "It is incontestable that the Constitution established a system of 'dual sovereignty,'" comprised of state and federal sovereigns. *Printz v. U.S.*, 521 U.S. 898, 918 (1997) (*quoting from Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). This bilateral structure permits no third berth for tribes. The balance in the system is found in the reciprocity of influence one sovereign has over the other. In particular, the Constitution assumes the States' "active participation in the fundamental process of governance." *Alden v. Maine*, 527 U.S. at 713. The States' role is made express in one part of the constitutional text after another. *E.g.* Article I, §§ 2 and 3; 17th Amendment; Article II, § 1; Article IV, § 3, cl. 1; Article IV, § 4.; Article V; Article VII.

The Constitution's dual sovereignty also presupposes a dual system of state and federal courts:

> The two together form *one system of jurisprudence*, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

Claflin v. Houseman, 93 U.S. 130, 137 (1876) (emphasis added). No precedent, tradition or any historical material, however, contemplates a role for tribal courts in this "one system of jurisprudence." The idea simply is foreign to the binary system the Founders created.

Professor Pommersheim poses what he considers to be the "essential quandary: Where do tribal courts fit within contemporary federalism and what is the doctrinal justification for the fit?" Frank Pommersheim, *"Our*

Federalism" In the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 149 (2000). The answer is that tribes do not fit into the Constitution's dual sovereignty at all. Neither the founders nor the Court has given any indication that tribes should hold a Constitutional status in parity with States and the Federal Government.

As the Court has ultimately made clear:

> Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from or exist in, subordination to one or the other of these.

United States v. Kagama, 118 U.S. 375, 379 (1886).

To invite tribes to share this constitutional power would introduce a destabilizing influence that precedent, history, and common sense simply do not support. The symmetry and mutuality of the Constitution would be lost if tribes were given an organic role in this dual system of government.

3. Tribal Court Jurisdiction Over State Officials Is Inconsistent With Limited Tribal Sovereignty.

Tribal adjudicatory jurisdiction over state officials is also inconsistent with tribal sovereignty as defined by federal law.[3] "[T]he existence and extent of a tribal court's

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[3] Tribes are not sui juris; their jurisdiction is a question of federal law. "The question whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one

jurisdiction," the Court has instructed, "require a careful examination of tribal sovereignty [and] the extent to which that sovereignty has been altered, divested, or diminished." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985).

Jurisdiction of tribal courts cannot be separated from the more general characterization of tribes as limited sovereigns. Tribes are not equivalent to States; they are "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), and their sovereignty is of a "limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). They thus are subordinated to the superior power of the federal government. *United States v. Rogers*, 45 U.S. (4 How.) 567, 571 (1846). "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant*, 435 U.S. at 209. Unlike state sovereignty, "[a]ll aspects of Indian sovereignty are subject to defeasance by Congress." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984).

As a result of the incorporation of Indian Tribes into the Nation, there are "inherent limitations on tribal powers." *Oliphant*, 435 U.S. at 209. These powers are "implicitly divested . . . by virtue of [tribes'] dependent status." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983). Such divested powers preclude tribes from transferring lands or exercising external political sovereignty, *Oliphant*, 435 U.S. at 209, and preclude them from exercising criminal jurisdiction over nonmembers, *id.* at 210-11.

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that must be answered by reference to federal law." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985).

This case exposes—and, we respectfully submit, should establish—an additional divestiture of tribal power, only now apparent because Hicks has filed these novel lawsuits. Just as tribal assertion of criminal jurisdiction over nonmembers represented "a relatively new phenomenon," *Oliphant*, 435 U.S. at 196-97, so here do tribal court actions against state officials. "It is therefore not surprising to find no specific discussion of the problem before us in the volumes of the United States Reports." *Id.* at 197. The Tribe cannot demonstrate any tradition by which it or any tribe has ever exercised either adjudicatory or regulatory power over States. *Cf. Rice v. Rehner*, 463 U.S. 713, 720 (1983) (construing tribal sovereignty by reference to powers traditionally exercised by tribes). Even if such authority once existed, moreover, it surely was divested when the nation was formed. Such jurisdiction is "beyond what is necessary to protect tribal self-government or to control internal relations [and therefore] is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *South Dakota v. Bourland*, 508 U.S. 679, 694-95 (1993) (*quoting Montana*, 450 U.S. at 564).

Nor is this attempted extension of tribal power consistent with the theory of limited tribal sovereignty. Tribes have the "power to make their own substantive law in internal matters and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). "[T]he sovereignty retained by tribes includes 'the power of regulating their internal and social relations.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (*quoting United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). Yet all of these are inwardly directed powers, limited in effect to tribal members. As the Court made clear in *Santa Clara Pueblo*, 436 U.S. at 55-56, these internal matters include tribal authority to control membership, *Roff v. Burney*, 168 U.S. 218 (1897), authority

over a tribe's inheritance rules, *Jones v. Meehan*, 175 U.S. 1 (1899), and authority over domestic relations, *United States v. Quiver*, 241 U.S. 602 (1916).

The Tribe's assertion of adjudicatory jurisdiction in the instant matter, however, is of a different order from the tribal powers recognized in these precedents. Mr. Hicks' claims are not based on questions of tribal membership, domestic relations, or probate, but instead are founded in non-traditional law, far removed from the essential "internal matters" referred to in *Kagama, Santa Clara Pueblo,* and *Mescalero Apache Tribe.*

Nor does *Williams v. Lee*, 358 U.S. 217 (1959), support this exercise of tribal power. *Williams* involved a non-Indian plaintiff suing an Indian defendant in state court for a debt incurred on a reservation. The Court's decision thus served as a shield for the Indian defendant. The result protected not only the tribe, but primarily the tribal member. This result is cut from the same protectionist cloth as many cases preceding and following it. *See, e.g., United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (tribes are accorded a "historic immunity from state and local control"). *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-54 (1982) ("This Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference"); *Fisher v. District Court*, 424 U.S. 382 (1976) (the Court shielded an Indian mother from a state court adoption proceeding); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971) (the Court shielded a tribal member sued in state court on a food debt).

But in the instant case, the Ninth Circuit's decision recognizing tribal adjudicatory authority over state officials turns the shield of *Williams v. Lee* into a sword. The Tribe asks the Court to recognize tribal authority to render judgment against state officials for millions of dollars and

even the right to punish the state officials in tribal court and under tribal law. *See* P. App. at I-5 (Hicks' prayer for punitive damages). This is a quantitatively different kind of jurisdiction, one that dramatically departs from these precedents and from *Williams* itself.

4. State Immunity Protects Individually Named State Officials Sued In Tribal Court.

The lower courts, notably, did not confront the interplay of tribal and state sovereignty. Instead, their position was that, once Hicks dismissed his claims against the State and the official capacity defendants, the actions could proceed without regard to state sovereignty. In their view, "the Fallon Tribal Court has jurisdiction to adjudicate Hicks' claims against the state defendants in their individual capacities." P. App. at B-16; *see* also 196 F. Supp. at 1468. In agreeing that this pleading expedient allowed Hicks to have more access to the Nevada fisc than other residents of Nevada, the lower courts erred in several respects.

Individual capacity lawsuits, like relief under the *Ex Parte Young* doctrine, are creations of federal courts and of federal law. They have no application to claims brought in tribal courts under tribal law. An allegation in federal court that official conduct is contrary to the United States Constitution or a federal statute, it may be true, suffices "to override the State's protection" under the Eleventh Amendment because the official is treated as acting beyond his authority. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). No good reason exists, however, for extending these extraordinary doctrines beyond the circumstances that gave rise to them—principally the need for a national forum for vindicating federal rights and for ensuring their uniform application. *See Pennhurst*, 465 U.S. at 105 ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication

of federal rights."); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989).

Under similar circumstances, the Court has declined to extend these *ultra vires* doctrines beyond the setting of federal courts and federal law. In *Pennhurst*, 465 U.S. 89, individual claimants sued state officials for prospective injunctive relief under state law. They claimed the State's immunity from suit could be circumvented by alleging that the state actors had violated state law and therefore were necessarily acting *ultra vires*. The Court rejected this far-reaching theory, recognizing that it would "emasculate the Eleventh Amendment," *id.* at 106, thereby allowing all manner of claims against state officials (and effectively States) under any law and in any court. The Court first noted that "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Id.* at 105. It then noted that in balancing these interests, the Court had "declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States." *Id.* (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

Next, the Court observed that it had previously rejected similar extensions of these fictions. "In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)," the Court observed, it "was faced with the argument that an allegation that a government official committed a tort sufficed to distinguish the official from the sovereign." *Pennhurst*, 465 U.S. at 112. In rejecting this argument in *Larson*, the Court noted "that it would make the doctrine of sovereign immunity superfluous. A plaintiff would need only to 'claim an invasion of his legal rights' in order to override sovereign immunity." *Id. (quoting Larson* at 337 U.S. at 693). Finally, for many of the same reasons that the Court declined to extend this fiction in *Larson*, it declined to extend it in *Pennhurst* because it "would make the

constitutional doctrine of sovereign immunity a nullity." *Id.* at 112. *See also Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945) ("When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants.").

The Court should likewise decline to extend these *ultra vires* principles to a claim under tribal law filed in tribal court. No legal basis or authority exists for disregarding state immunity rules in this area. Nevada law treats these lawsuits as claims against the State and accordingly they may be prosecuted only in state court. Because Hicks has not complied with these requirements, his tribal-law claims must be dismissed as barred by Nevada principles of sovereign immunity.

5. Tribal Law Does Not Unambiguously Abrogate State Immunity From Suit.

Even if the Tribe has inherent authority to abrogate the State's immunity from suit, it should be held to the same standard as other sovereigns in exercising this extraordinary power. Specifically, to the extent the Tribe claims authority to regulate States and state officials, it must unambiguously express that intent. *Seminole Tribe*, 517 U.S. at 55. Courts presume that one sovereign will not casually regulate another. Congress, for instance, must unequivocally state its intent to regulate the States. *Gregory v. Ashcroft, supra*; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). The same is true for other sovereigns. *Cf. Schooner Exchange v. McFadden*, 11 U.S. 116, 146 1812); *Benz v. Compania Naviera Hidelgo*, 353 U.S. 138, 147 (1957). The Tribe has expressed no such intent here, however, and for this independent reason the claims must be dismissed.

Hicks filed multiple tribal-law claims against Nevada and its officials. None contains a precedential or statutory

foundation for abrogating any State's, or all States', immunity from suit. The tort claims have no statutory basis at all; they are founded only in tribal "common law." Without at least a foundation in positive law, such tribal claims cannot even be adequately evaluated when legally challenged. Their lack of definition invites a morass of litigation to define fundamental issues, such as authority for off-reservation service of process and other documents, scope and effect of state immunity, limits on tribal authority to exceed state damages caps, tribal authority in official capacity suits against the State, rules of evidence, tribal authority to compel discovery and attendance of witnesses, enforcement of judgments, and rights of appeal or other review in federal courts. Questions of immunity alone invite, in this case, many more years of litigation if the Ninth Circuit's decision to remand the case to tribal court is affirmed. Off-reservation collection of any judgments invites still more.

Moreover, there are twenty-six tribes and bands in Nevada alone. Answers to each of these questions will be different for each tribe. To the extent federal courts serve as arbiters in these matters, this promises a breathtaking field for federal common law development. To the extent the State must litigate to find answers in each of the tribal courts, its resources of course will be adversely affected as well.

The lack of tribal guidance regarding answers to these questions confirms the merit of requiring immunity to be unambiguously abrogated, and the claims specifically explained, before state defendants are called to answer in tribal courts. If the tribes, in short, wish to be treated as sovereigns, they must act as sovereigns, by clearly stating an intent to abrogate state immunity, and by explaining the applicable procedures. The Tribe's failure to do so here requires dismissal of these tribal law claims.

B. The § 1983 Claim Must Be Dismissed.

Many of the same principles that require dismissal of the tribal-law claims also require dismissal of the § 1983 claim. Congress failed clearly to make this cause of action applicable in tribal courts and, at any rate, lacked the power to do so.

1. A Congressional Waiver Of States' Immunity In Tribal Courts Under Federal Law Must Be Unambiguously Expressed.

Analysis of the § 1983 claim starts with first principles, foremost among them the tenet that one sovereign may not lightly regulate another. The States for example may not regulate the Federal Government at all. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Cf. Westfall v. Erwin*, 484 U.S. 292 (1988). And the Federal Government may not regulate the States except under discrete delegations of power and except when Congress complies with carefully prescribed limitations on the exercise of those powers.

One of the most critical limitations on this power is a stringent presumption against regulation of state action and alteration of the federal-state balance in the absence of a clear statement. Recognizing that "the States' immunity from suit is a fundamental" attribute of "sovereignty," *Alden*, 527 U.S. at 713, and that the immunity is designed to preserve the "constitutional balance between the Federal Government and the States," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985), the Court has not casually inferred abrogations of it. Only an "intention to abrogate the States' immunity unmistakably clear in the language of the statute" will suffice. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635 (1999) (quotation omitted). Whether stated as an "unmistakably clear" requirement, *Atascadero*, 473 U.S. at 242, as an unequivocal and textual" requirement,

Dellmuth v. Muth, 491 U.S. 223, 230 (1989), or merely as a "clear statement" rule, *Will*, 491 U.S. at 65 (quotation omitted), the point is the same: Congress must leave no doubt about its intentions.

2. Section 1983 Does Not Create A Cause Of Action Against State Officials Enforceable In Tribal Courts.

Abundant doubt surrounds assertion of a § 1983 claim in tribal courts, and accordingly Congress did not satisfy this "strict standard." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). Text, history, and precedent all indicate that Congress did not authorize the filing of § 1983 claims in tribal courts.

Consider first the language of the statute:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983. Nothing in the statute discloses any authority to bring claims in tribal court. That fact alone should suffice to defeat this anomalous claim. A Congress respectful of the States' role in the constitutional framework presumably would have alerted state officials that they could be exposed to these actions in foreign jurisdictions had they so intended. Just as surely, the States in 1871, whether from the North or the South, would never have acquiesced in such an unusual incursion on their authority.

In construing § 1983 in the past, the Court has looked "both to history and to the 'special policy concerns involved in suing government officials.'" *Richardson v. McKnight*, 521 U.S. 399, 404 (1997) (*quoting Wyatt v. Cole*, 504 U.S. 158, 167 (1992)). Neither "history" nor the "special policy concerns" applicable to actions against state officials in federal court, however, support such actions in tribal courts.

History, for example, confirms the textual skepticism that greets this claim. Even if Congress could comply with the clear-statement rule through the legislative history of § 1983, which it may not, *United States v. Nordic Village*, 503 U.S. 30, 37 (1992), the history of the Act is mute on the issue of tribal courts. Nor as a matter of Indian history should that omission come as a surprise. Tribal courts, as noted above, did not take root until two to three generations *after* Congress enacted § 1983 in 1871. "Until the middle of this century, few Indian tribes maintained any semblance of a formal court system." *Oliphant*, 435 U.S. at 197. *See generally Duro v. Reina*, 495 U.S. 676 (1990); Nancy Thorington, *Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 981 (2000) (finding that tribal courts did not even exist in rudimentary form until the 1880's).

A "policy concern[]" militating against extending civil rights jurisdiction to tribal courts is the chilling effect tribal adjudicatory jurisdiction would have on tribal-state relations. Many areas of governmental jurisdiction may be appropriately and prosperously shared between tribal and state, or tribal and local, governments. But this kind of cooperation would be discouraged if state officials were open to suit in tribal courts. This effect has already been foreseen. *See State of Montana v. Gilham*, 932 F. Supp. 1215, 1224 (D. Mont. 1996), *aff'd*, 127 F.3d 897 (9th Cir. 1997).

Precedent, too, undermines this claim. The Court's cases all refer to the availability of § 1983 claims in federal or state courts, but say nothing about their availability in tribal courts. In *Monroe v. Pape*, 365 U.S. 167, 180 (1961), the Court said that "[i]t is clear that one reason the legislation was passed was to afford a federal right in federal courts." *Monroe* should not be extended here. And in *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 506 (1982), the Court said that "many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system." However, the Court has never said anything more about forum availability, and specifically has never suggested that Congress intended such claims to be brought in tribal court.

Furthermore, as noted below and suggested above, such actions raise vexing constitutional questions about a third tier of sovereigns within a bilateral national sovereignty. Premature consideration of those questions should be avoided, the Court has recently reminded litigants, when a plausible interpretation of the statute exists that would avoid these questions. *Jones v. United States*, 120 S. Ct. 1904, 1911 (2000).

3. Congress Lacks Authority To Create Any Such Cause of Action.

Even if Congress unambiguously purported to expose state officials to § 1983 claims in tribal courts (which it assuredly did not), it lacked authority to do so. When a state asserts its immunity from suit, that immunity controls in the absence of a constitutionally permissible abrogation of it, wherever the underlying claim is filed. *See Alden*, 527 U.S. 706. Yet no source of authority for abrogating that immunity exists here.

No constitutional basis exists for compelling the State or its officials to answer to tribal courts (as opposed to federal courts) for claims grounded in federal law. Nothing

in the Indian Commerce Clause or the Fourteenth Amendment purports to authorize such actions. Neither the Tribe nor the lower courts have identified any such authority. Instead, both the respondents and the lower courts have started with the presumption that § 1983 is a permissible exercise of congressional power (which it is, so far as it customarily goes), then leaped to the conclusion that because Hicks brought these claims against the officials in their "individual capacity," Nevada's immunity has no relevance. No support, however, exists for this wholesale transfer of federal individual capacity doctrine to the unique setting of tribal courts.

As an original matter, the Court's individual-capacity doctrine states a paradox in the context of § 1983 claims. It maintains on the one hand that state officials sued in their individual capacity are not acting under state law for purposes of sovereign immunity under the Tenth and Eleventh Amendments, but on the other hand that state officials are acting "under color" of state law for § 1983 purposes. *See Pennhurst*, 465 U.S. at 105 (referring to the doctrine as a "well-recognized irony"). Yet no basis exists for extending this doctrine to claims filed outside of the federal courts. Not only would extending it to the tribal courts fail to advance the objective of having a uniform interpretation of federal law, but it also would positively undermine it. The fact is, there exists no true right of federal appeal from tribal courts, and accordingly civil rights actions in tribal fora would lead to disarray in the development of federal statutory and constitutional law.

As a matter of comity, moreover, § 1983 enforcement in tribal courts does not make sense because tribal officials are not subject to the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Accordingly they may not be subjected to § 1983 claims. Tribal judges therefore will have little reason to be sensitive to competing policy concerns that influence rulings in state or federal courts.

Unlike other individual capacity cases, no special need exists to create a new remedy in tribal court, since there are federal and state courts already available to afford relief. Hicks acknowledged he could have brought his actions in state court, or in federal court, but for convenience, chose to file in tribal court. This thus is not a constitutional theory that "would absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities." *Hafer v. Melo*, 502 U.S. 21, 28 (1991).

Finally, if § 1983 actions may lie in tribal courts against state officials, then on the same logic, *Bivens* claims against federal officials may also lie. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). To our knowledge, no constitutional case supports this extension of tribal jurisdiction. Neither is any such extension permissible with regard to state officials.

II. STATE OFFICIALS' CLAIMS OF SOVEREIGN AND QUALIFIED IMMUNITY SHOULD BE DECIDED TOGETHER WITH THE QUESTION OF TRIBAL COURT JURISDICTION.

As shown, the claims against Petitioners all amount to claims against the State and, accordingly, must be dismissed because Indian Tribes lack authority to abrogate the State's immunity from suit. Even if that is not true, however, the defendants' immunity defenses should have been considered with the jurisdictional issue.

In their first tribal court appearance, the Nevada officials asserted immunity as a bar to tribal jurisdiction. *See e.g.* P. App. at J-3 to J-6 (State's Motion to Quash). They maintained this posture at every step thereafter. K-1 to K-13 (State's Supplemental Brief). *See also* Dist. R. at 25:422 (state's appeal to Intertribal Appellate Court), Dist. R. at 25:426-430 (State's post-hearing brief on appeal). Hicks, for his part, engaged the issue as well, extensively

describing why he thought the State's immunity did not bar jurisdiction. Dist. R. at 25:64-75, 100-102, 200-203, 206-32, 255-90, 315-70, and 448-60.

The tribal court in the end ruled that "it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal jurisdiction over specially appearing State defendants." P. App. at L-1 (*quoted at* 196 F.3d at 1030). The Intertribal Court of Appeals in turn called the State's immunity arguments "only . . . an extension of their unsuccessful argument in . . . *Nevada v. Hall*." P. App. at C-7.

Notwithstanding all of this, the Ninth Circuit determined that "the state did not exhaust its remedies regarding the sovereign immunity defense before the tribal court." 196 F.3d at 1029. The court of appeals justified its conclusion in part by characterizing sovereign immunity as an affirmative defense rather than a jurisdictional one. *Id.* at 1029 n.12. Consequently, the Ninth Circuit determined that the issue should be returned to tribal court. 196 F.3d at 1032.

As an initial matter, the Ninth Circuit's ruling on exhaustion should be reversed because the tribal courts clearly did decide the questions of immunity. But even if the appellate court's factual conclusion was correct, it improperly established a two-step procedure for exhaustion of immunity issues. It required state officials to exhaust all jurisdictional issues in tribal court, then separately exhaust immunity issues. This procedure is not justified by the Court's precedents, it is burdensome, and it undermines the purpose of immunity.

A. Immunity Must Be Considered Along With The Jurisdictional Determination.

1. This Court's Decisions Consider Immunity As Part Of The Jurisdictional Inquiry.

Sovereign immunity and jurisdiction are inextricable. This Court has already refuted the argument that a state's immunity "does not confer immunity from suit, but merely a defense to liability." *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993). The argument was rejected because it

> misunderstands the role of the [Eleventh] Amendment in our system of federalism: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 443, 505, 31 L. Ed. 216, 8 S. Ct. 164 (1887).

Id. at 146. *See also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119-20 (1984).

The Court's most recent decisions confirm that the Ninth Circuit fundamentally misapprehended the fact that sovereign immunity is indeed a jurisdictional defense. In *Seminole Tribe of Fla.*, 517 U.S. at 52-53, the court of appeals:

> disagreed with the District Court . . . that the Indian Commerce Clause grants Congress the power to abrogate a State's Eleventh Amendment immunity from suit, and *concluded therefore that it had no jurisdiction* over petitioner's suit against Florida." [Emphasis added.]

This Court affirmed. It explained that

> It was well established . . . that the Eleventh Amendment stood for the constitutional principle that

> state sovereign immunity limited the federal courts' jurisdiction under Article III.

517 U.S. at 64.

The Court followed the same approach—referring to immunity in order to determine jurisdiction—in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 691 (1999) ("we hold that the *federal courts are without jurisdiction* to entertain this suit against an arm of the State of Florida") (emphasis added); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 638 (2000) (affirming dismissal of three actions, including one in which a state litigant had "moved to dismiss the suit for lack of subject matter jurisdiction, contending it was barred by the Eleventh Amendment"); and *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) ("Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power."). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 265 (1997) (in action against State as well as its individually-named officials, "defendants moved to dismiss the Tribe's complaint on Eleventh Amendment immunity grounds," and the action was dismissed).

Thus the State's immunity should have been examined in order to determine the tribal court's jurisdiction, and not reserved for later treatment. The Ninth Circuit's conclusion to the contrary constitutes reversible error.

2. Tribal Immunity Is Treated As Part Of The Jurisdictional Inquiry.

Nor do tribes treat this issue differently when they are sued. Because mutuality of amenability to suit is one of the cardinal principles the Court has looked to in deciding immunity issues arising between Indian Tribes and States, *Blatchford*, 501 U.S. at 782, a brief comparison is warranted.

Claims of sovereign immunity are considered jurisdictional when raised by tribal officials. *See e.g. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit"). *See also Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416, 417-18 (9th Cir. 1989) (suit against tribe dismissed when "Band filed a motion to dismiss for lack of personal and subject matter jurisdiction and failure to state a claim," and Circuit held that "the issue of tribal sovereign immunity is jurisdictional in nature"); *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989) ("issue of tribal sovereign immunity is jurisdictional in nature"); and *Arizona Public Service Co. v. Aspaas*, 69 F.3d 1026, 1032 (9th Cir. 1995) (tribal sovereign immunity is jurisdictional in nature).

When tribal officials are sued, moreover, federal courts address tribal and individual defenses together to determine jurisdiction over them. *See e.g. Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991), *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985), *Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994). Mutuality requires that state immunity be given the same jurisdictional effect as tribal immunity. *See Blatchford, supra.*

B. The Tribal Court Exhaustion Rule Is Prudential, And The Policies Underlying It Do Not Support The Independent Exhaustion Of Immunity.

Even if the immunity of state officials is separated from the jurisdictional determination, the tribal court exhaustion rule does not require the case to be returned to tribal court for still further consideration. This prudential rule has no application here.

The decisions in *National Farmers Union Ins. Cos.*, 471 U.S. 845 and *Iowa Mutual Ins. Co.*, 480 U.S. 9 "describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 448 (1997). The rule, however, is "not an unyielding requirement." *Id.* at 449 n.7. It is "'prudential,' not jurisdictional." *Id.* at 451. Exhaustion is not required when it is apparent that "state or federal courts will be the only forums competent to adjudicate" certain disputes. *Id.* at 459 n.14. In such cases, "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." *Id.* This is just such a case. No matter how the issues in this case are characterized, only state or federal courts may decide the claims Hicks makes against the state officials.

No less importantly, delay in deciding the immunity claims vitiates the very immunity being asserted. The "value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 506 U.S. at 145. Assertions of immunity were first made in this case in 1991. P. App. at J-1 to J-7. The tribal court had generous opportunities to decide the immunity issues. This Court has never said that exhaustion requires the tribal courts to make a ruling, only that they be afforded an *opportunity* to do so. *E.g.*, *National Farmers Union*, 471 U.S. at 857; *Iowa Mut. Ins. Co.*, 480 U.S. at 16; *Strate*, 520 U.S. at 451. At some point the federal interest in promoting tribal self-government must be balanced against other competing policies, such as those protecting state immunity or promoting efficient justice for the named individuals.

Finally, the individual state officials deserve an early decision on their qualified immunity defense, and should be accorded relief in federal court when the tribal court fails to grant relief promptly. Individual immunity was raised by

the State in July of 1991. P. Exh. at J-5 to J-6. The qualified immunity enjoyed by an official is immunity from suit, and it is lost if not decided at the earliest stages of litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

> [A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.

Conn v. Gabbert, 526 U.S. 286, 290 (1999) (citations omitted). This order of procedure is designed to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (*quoting Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). To spare the four Nevada officials from unwarranted litigation demands, all that the State asked the tribal court, then the federal court, to do was this: determine whether Hicks had alleged the violation of an "actual constitutional right at all." All of this was to no avail, however.

The paradigmatic example of this delay is former Division of Wildlife Administrator, William Molini. The only place his name appears in case CV-FT-091-034 is in the caption of the original complaint. P. App. at H-1. It appears *nowhere* in the current version of the complaint. P. App. at I-1 to I-5. Hicks has amended the complaint four times; the tribal court had three years and four different complaints to discern that no allegation is made that Molini violated a federal right; the federal courts have had six additional years. Nothing could be added by further delay. Yet none of the courts has dismissed the action against Mr. Molini. The Ninth Circuit's return of this matter to tribal court after nearly ten years is difficult, if not impossible, to justify as a matter of judicial efficiency or fairness.

III. NEITHER *MONTANA* EXCEPTION TO THE PRESUMPTION AGAINST TRIBAL JURISDICTION OVER NONMEMBERS SUPPORTS THE NINTH CIRCUIT'S DECISION.

Even if tribal jurisdiction is not barred by sovereign or individual immunities, jurisdiction is absent here, based upon *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* decision is "the path marking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445. *Montana* creates a main rule and two exceptions. The main rule is the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The exceptions exist where there is either (1) consent of the nonmember to tribal jurisdiction, or (2) nonmember "conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Neither exception applies here.

A. Under *Montana*, The Tribe Lacks Jurisdiction Over These State Officials In This Case.

1. The Main Rule Of Presumption Against Tribal Jurisdiction Applies Here.

Montana's "general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute." *Strate*, 520 U.S. at 449. There are no treaties or statutes that delegate any adjudicatory authority to the Fallon Paiute-Shoshone Tribes. Therefore the general rule applies, and tribal jurisdiction over nonmembers is presumed not to exist.

2. *Montana's* First Exception Does Not Apply.

The first *Montana* exception states that "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual

relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. The scope of this exception was limited in *Strate* to the types of activities involved in *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980). Dissimilar activities are not "of the qualifying kind." *Strate*, 520 U.S. at 457.

The relationship between the Tribe and state officials performing official functions is nothing like the fact patterns in which the Court has found such consent. In *Williams v. Lee*, the defendants operated a business venture on a reservation and entered into commercial transactions with tribal members. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, the defendants engaged in taxable commercial transactions. And in *Morris v. Hitchcock*, the defendant conducted commercial transactions on the reservation.

To the extent the state officials' conduct parallels any prior case in this respect, it is *Strate*. There, the defendant was an employee of a non-Indian subcontractor who entered into a contract with a tribal corporation. *Strate*, 520 U.S. at 457. That contract did not create the qualifying kind of consensual relationship for *Montana* purposes, the Court held, because the injured tribal plaintiff "was not a party to the subcontract, and the Tribes were strangers to the accident." *Id.* at 457 (quotation omitted). Similarly, in this case, Hicks was not a party to the relationship between the state officials and the Tribe, and the Tribe is a stranger to any damages alleged by Hicks.

Neither may these principles be circumvented by the claim that entry upon tribal land amounts to constructive consent to the tribal court's jurisdiction. That would allow a tribe to eliminate *Montana's* main rule merely through a unilateral legislative act creating the necessary consent as a

constructive waiver of immunity. Precedent forecloses this theory. *See College Savings, supra*.

3. *Montana's* Second Exception Does Not Apply.

The second *Montana* exception provides tribes with authority over nonmembers when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Yet, as *Strate* illustrates, a tribe's inherent power does not reach "beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459 (*citing Montana*, 450 U.S. at 564). The everyday activities of the state officials in this case hardly qualify under this standard. The state officials sought and were expressly given authorization by the tribal judge to be on the Reservation, and tribal police officers accompanied the officials to the Hicks residence. There is no allegation that the officials were any threat to the Tribe's political integrity or control of its members; nor could there be on this record.

Proving the point, the claims filed by Hicks allege injury to him personally, not to the Tribe. The two incidents from which Hicks alleges injury were isolated incidents that, of themselves, could not plausibly threaten the Tribe.

The district court determined that this case falls within the second exception because "the Tribe has an interest in providing Mr. Hicks, and any other tribal member similarly situated, a forum in which to vindicate these rights." P. App. at B-13. However, the Tribe's generalized interest in providing a forum for its members is not the type of tribal interest that was described in *Montana*. Because the tribal court plaintiff could file a state or federal action to protect her individual interests, "[o]pening the Tribal Court for her optional use is not necessary to protect tribal self-government." *Strate*, 520 U.S. at 459. In *Strate*, the Court

also rejected the tribes' *general* interest in the health and welfare of tribal members as sustaining the exception. "Those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule." *Strate*, 520 U.S. 457-58. The same rationale applies here.

B. *Montana's* Rule Applies To All Nonmember Cases Without Reference To Land Status.

In the Ninth Circuit's view, however, *Montana* does not apply at all to this case. In one respect, we agree: because tribes lack authority to abrogate a State's and its officials' immunity from suit, neither the *Montana* rule nor its exceptions need to be considered. But that is not what the Ninth Circuit held. It converted the *Montana* presumption against tribal jurisdiction into a presumption in favor of jurisdiction when the alleged misconduct occurs on tribal land. That is wrong.

1. Precedent Supports *Montana's* Broad Reading.

In *Montana*, the Court relied upon *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978), all of which stand for the broad proposition that tribes have been divested of powers inconsistent with their status, among them the power to exercise jurisdiction over nonmembers. *See also Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). *Montana* confirmed the sweeping nature of this rule: "the principles on which [*Oliphant*] relied support the *general proposition* that inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565 (emphasis added). So do later

cases. *See, e.g., County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 267 (1992); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) ("after Montana, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation'").

In establishing a categorical rule that Indian Tribes do not have criminal jurisdiction over nonmembers, *Oliphant* relied heavily on the interests and expectations of nonmembers, including their right to be protected from "unwarranted intrusions on their personal liberty" in tribal courts. *Oliphant*, 435 U.S. at 210. *See also Strate*, 520 U.S. at 459 (considering whether nonmember ought to be made to appear "in an unfamiliar court"). *Oliphant* also relied upon the historical status of tribes to define their present day jurisdiction, and on this basis determined that criminal jurisdiction over non-Indians was inconsistent with tribal status. *Oliphant* 435 U.S. at 197-98. The Court gleaned from the historical record an "unspoken assumption" that tribal jurisdiction over nonmembers does not exist. *Id.* at 203.

United States v. Wheeler, 435 U.S. 313, 326 (1978), is to like effect. The Court described the limited retained powers of tribes as those sovereign powers that were not withdrawn by treaty, statute, or "by implication as a necessary result of their dependent status." *Id.* at 323. Such implicit divestiture, the Court added, has occurred in areas "involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326. Tribal self-government in contrast principally "involve[s] only relations among members of a tribe." *Id.*

Conspicuously missing from *Oliphant*, *Wheeler*, and even *Montana* is any compelling indication that the general presumption against jurisdiction should turn on land status.

None of the precedents establishes a distinction based on that factor. And a tribe's relationship with a nonmember, even on tribal land, simply is not generally an internal matter necessary for self-government.

Lastly, it deserves mention that control of nonmembers originally fell to federal authorities. *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832) ("Indian nations were, from their situation, necessarily dependent on the [United States] . . . for the protection from the lawless and *injurious intrusions* into their country.") (emphasis added); *Wheeler*, 435 U.S. at 323-26 (tribes' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised"). This historical dependence upon the federal government for protection from nonmembers is inconsistent with a residual right of tribes to exercise self-help, especially if such self-help includes within it remedies above and beyond legitimate expulsion. The tribes' historical reliance on the United States for protection, together with the absence of any treaty or statutory provisions establishing their own power over nonmembers, signify a divestiture of such power, requiring congressional restoration if it is to be asserted here.

2. Subsequent Decisions Have Not Limited The *Montana* Presumption.

Nothing decided since *Montana* has limited the application of its presumption against tribal jurisdiction. The two principal decisions that followed *Montana* expressly did not decide the proper rule for nonmember conduct on tribal land.

Contrary to the Ninth Circuit's decision, *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), does not alter this presumption based on land-ownership. All that was at issue in *El Paso* was whether lower federal courts

properly applied the doctrine of tribal exhaustion. 526 U.S. at 473. Exhaustion was determined unnecessary because the federal Price-Anderson Act requires that claims arising under it be heard in federal court. The Court did not address whether the tribal court had jurisdiction in the absence of the Act. That issue was not presented, as appeal of the tribal court's denial of injunctive relief was sought by the nonmember companies, "whether or not [the tribal] courts would have jurisdiction to exercise in the absence of the [Price-Anderson] objection." 526 U.S. at 485. The Court thus expressly declined to address the issue. 526 U.S. at 483 n.4.

Strate also left the question open. It involved a lawsuit arising from an accident that occurred on a state highway, and to which the Court applied *Montana*. The Court preceded its analysis with the proviso that "[w]e express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." 520 U.S. at 442. In doing so, it did not prescribe a different rule for application on tribal land, nor did it reject *Montana*'s application on such land. Again the issue was left undecided.

3. The *Montana* Rule Protects Inherent, Retained Tribal Powers, Including The Right To Exclude.

In refusing to follow this approach, the Ninth Circuit concluded that the "Tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land." 196 F.3d at 1028. This reasoning, however, turns on a false dichotomy. Even assuming for the sake of argument that the Tribe maintains the same rights to exclude nonmember state officials that it has to exclude other nonmembers, this right may still be construed consistently with *Montana's* general presumption, and not as a source of general adjudicatory jurisdiction.

Tribal control over land, indeed, is a factor that the *Montana* exceptions already consider. The first *Montana* exception, based upon consent by the nonmember, allows jurisdiction over commercial uses occurring *on* tribal lands. It thus pertains in many cases to nonmembers present on tribal land, making use of tribal resources for their own gain. *Montana's* second exception is also protective of tribal territory, permitting jurisdiction over nonmembers who represent a threat to tribal political and economic integrity, or to the health and welfare of the tribe. These exceptions in short already account for land-based concerns whether stemming from the right to exclude or from any other considerations.

4. Tribal Adjudicatory Jurisdiction Should Not Depend Upon Land Status In Indian Country.

Land status also is an unreliable basis upon which to determine tribal adjudicatory jurisdiction. Indian-owned allotments such as Mr. Hicks' are subject to conveyance out of Indian ownership. A jurisdictional presumption that shifts, based upon changing Indian ownership of allotments, would prove unworkable. It also would give no notice to nonmembers, whose susceptibility to tribal jurisdiction would turn on the most recent land transactions.

Permutations of land ownership also know no bounds. Jurisdiction that depends on land ownership characterized by the member/nonmember dichotomy may become impossible to define with divisible heirships, marriages, and devises. *See Hodel v. Irving*, 481 U.S. 704, 718 (1987) (finding "little doubt that the extreme fractionation of Indian lands is a serious public problem"). Conveyance of less than fee interests into non-Indian ownership will also confuse jurisdiction. A model for adjudicatory jurisdiction based on ownership invites unending litigation and uncertainty.

C. *Montana* Should Apply In This Case Because The Tribe Approved The State Actions.

Even assuming *arguendo* that the *Montana* rule does not normally apply to activities on Indian-controlled land, the *Montana* analysis should nonetheless apply in this case because the tribal judge approved the state officials' entry onto the Reservation. This rendered the Hicks allotment, for nonmember governance purposes, the functional equivalent of alienated, non-Indian land. *See Strate*, 520 U.S. at 454-57 (referring to land on which the tribe provided a state right-of-way as equivalent to non-Indian alienated land because Tribe waived gatekeeping right).

By expressly approving the State's search warrant in this case, the Fallon Tribe ceded its gatekeeping right, and thus alienated its control over Hicks' allotment at least for the purpose of executing the second warrant. The Tribe's surrender of its right to exclude the state officers justifies applying *Montana's* general presumption against tribal jurisdiction over nonmembers. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 423-24 (1989) (plurality opinion) (without right to exclude nonmembers, "that power can no longer serve as the basis for tribal exercise of the lesser included power [to regulate]").

CONCLUSION

Fifty States make up the Union. The courts of the States, together with the federal courts, form the jurisprudential infrastructure of the nation. The Constitution provides procedures for addition of other States to the Union; it provides none for admission of other governments. If admission of tribes and their courts as participants in the national government is to be done, it must occur by federal statute or by constitutional amendment.

Nevada of course does not seek to discourage the Tribe's self-determination or its self-government. However,

the State must also carefully guard its own sovereign prerogatives, including its immunity. It therefore requests that the Ninth Circuit's decision be reversed; that state immunity be deemed to bar all claims in tribal courts brought against a state or its officials in any capacity, when those claims arise from actions taken by officials in their role as state employees; and that the matter be remanded to the federal district court for entry of judgment in favor of the State and its officials.

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